

KEYWORD: Criminal Conduct

DIGEST: Applicant, a 48-year-old employee of a defense contractor, retired from the military after 20 years of service. In 1993 and 2004, the police charged him with assault on a family member. His first charge was dismissed six months later by the court when no further abusive conduct occurred. The second charge resulted in one year of probation and attendance at an anger management course. He is respected by his supervisor and co-workers, who describe him as a non-confrontational person. He has mitigated the government's concerns regarding his criminal conduct. Clearance is granted.

CASE NO: 05-03418

DATE: 05/08/2006

DATE: May 8, 2006

In re:

SSN:

Applicant for Security Clearance

ISCR Case No. 05-03418

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Richard Stevens, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

Applicant, a 48-year-old employee of a defense contractor, retired from the military after 20 years of service. In 1993 and 2004, the police charged him with assault on a family member. His first charge was dismissed six months later by the court when no further abusive conduct occurred. The second charge resulted in one year of probation and attendance at an anger management course. He is respected by his supervisor and co-workers, who describe him as a non-confrontational person. He has mitigated the government's concerns regarding his criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On September, 16, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline J (Criminal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. On October 12, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing.

This matter was assigned to me on January 30, 2006. A notice of hearing was issued on March 6, 2006, and a hearing was held on March 28, 2006. Three government exhibits and six applicant exhibits were admitted into evidence. The record was held open until April 12, 2006, for Applicant to submit additional documentation. The additional documentation was received on April 12, 2006. The government did not object to the admission of this evidence, which has been admitted as Applicant Exhibit G. ⁽¹⁾ Applicant and two witnesses testified. The hearing transcript (Tr.) was

received on April 7, 2006.

PROCEDURAL RULINGS

At the hearing, the government moved to withdraw subparagraph 1.a. of the SOR on the grounds it did not have sufficient evidence to establish its case.⁽²⁾ Applicant did not object.⁽³⁾ The government's motion was granted and subparagraph 1.a. of the SOR was withdrawn.⁽⁴⁾

FINDINGS OF FACT

In his response, Applicant denied the allegations in subparagraphs 1.a through 1.c. of the SOR.⁽⁵⁾ After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact:

Applicant is a 48-year-old engineering technician for a defense contractor.⁽⁶⁾ He has worked for this contractor or its predecessor for seven and one-half years.⁽⁷⁾ He retired from the United States Navy in 1998 with 20 years of service.⁽⁸⁾ He never received any disciplinary actions while in the Navy.⁽⁹⁾ He held a security clearance for 28 years.⁽¹⁰⁾ He completed a security clearance application (SF 86) in February 2004.⁽¹¹⁾

In 1982, Applicant married.⁽¹²⁾ At this time, his wife had two sons, ages 6 and 4.⁽¹³⁾ He raised these boys as his own.⁽¹⁴⁾ He and his wife had a daughter and a son.⁽¹⁵⁾ Since their marriage, he and his wife have argued about disciplining the children, and over their responsibilities at home, such as making their beds and picking up their rooms.⁽¹⁶⁾ While he was at sea during Operation Desert Storm, his wife bought a fixer up house without his knowledge.⁽¹⁷⁾

His wife usually favored the two older sons in any dispute.⁽¹⁸⁾ Her conduct directly led to his first arrest for assault and battery on a family member in August 1993.⁽¹⁹⁾ As a high school senior, Applicant's oldest son announced that he was giving up playing his trumpet.⁽²⁰⁾ Because the son was going to college on a band scholarship, they argued about the son's decision.⁽²¹⁾ The son, who had been lifting weights and thus, growing stronger, didn't want to listen to Applicant.⁽²²⁾ The son charged him, then picked him up off the floor.⁽²³⁾ When the son refused to put him down, Applicant put his
⁽²⁴⁾

son in an arm bar (a wrestling move) and brought him down to the floor. The son became angry and he had to restrain his son.⁽²⁵⁾ His wife then called the police and Applicant was arrested.⁽²⁶⁾

Applicant and his wife appeared in court on October 1, 1993.⁽²⁷⁾ His son did not because his wife sent him to school.⁽²⁸⁾ Applicant pled nolo contendere.⁽²⁹⁾ The court found the evidence sufficient, and ordered family counseling, requested his appearance in six months, and directed no further acts of abuse.⁽³⁰⁾ On April 1, 1994, the court dismissed the case.⁽³¹⁾

Eleven years later, in September 2004, the police again arrested Applicant for assault and battery on his daughter.⁽³²⁾ He and his wife began discussing a problem with the checking account balance and absence of money.⁽³³⁾ When he told his wife that he was going to call the bank, she picked up the telephone and threatened to call the police.⁽³⁴⁾ He grabbed the telephone from her with his left hand and pulled his arm back over his shoulder.⁽³⁵⁾ When he pulled his arm back, he accidentally hit his daughter on the lip.⁽³⁶⁾ He thought she was on the stairs 20 feet away and did not realize she had moved behind him.⁽³⁷⁾ His wife called the police, who arrested him.⁽³⁸⁾

Applicant appeared in court without counsel shortly thereafter.⁽³⁹⁾ He spoke with an attorney, whom he later learned was the prosecutor in his case.⁽⁴⁰⁾ The prosecutor asked whether he intended to plead guilty or not guilty.⁽⁴¹⁾ She also told him that he would do jail time, even though he accidentally hit his daughter.⁽⁴²⁾ Based on this conversation, he pled guilty to a misdemeanor offense, and did not tell the court that the incident was an accident.⁽⁴³⁾ The court sentenced him to one year probation, and directed that he attend anger management classes, which he did.⁽⁴⁴⁾

During their marriage, his wife opened many charge accounts, some in both names and some in her name, without his knowledge.⁽⁴⁵⁾ The bills became his responsibility.⁽⁴⁶⁾ His wife did not tell him that she had refused the recommendations of their youngest son's teacher for special education support and that she had taken their son out of school to home school him.⁽⁴⁷⁾ She did not tell him when another son dropped out of college or when his daughter dropped out of college.⁽⁴⁸⁾ His wife also supported their children, instead of insisting that they work.⁽⁴⁹⁾ Issues arose with his wife over buying and maintaining cars for their children.⁽⁵⁰⁾ She often blew issues out of proportion, then threatened to call 911 to get her way.⁽⁵¹⁾

In 2004, his youngest son moved out of the house after they argued, and refused to move home unless his father left.⁽⁵²⁾ His wife then requested that court issue a restraining order against Applicant, saying she was afraid of him.⁽⁵³⁾ He appeared in court.⁽⁵⁴⁾ The court told his wife she would not receive child support as her children were over 18.⁽⁵⁵⁾ He agreed that she could have her car, and he would move out of the house so she could move back into the house.⁽⁵⁶⁾ The court told her that since she had the car and house, and Applicant would stay away for two years, he would not need to

pay the house note if she moved back into the house.⁽⁵⁷⁾ She then told the court she was not afraid of him.⁽⁵⁸⁾ He continued to pay the bills and recently moved back into the house.⁽⁵⁹⁾ His wife is now living out of state.⁽⁶⁰⁾ He plans to proceed with a divorce.⁽⁶¹⁾

Applicant's supervisor testified regarding their working relationship.⁽⁶²⁾ They have worked together for over two years.⁽⁶³⁾ Applicant is a lead on the project.⁽⁶⁴⁾ He works well with his co-workers and the company's customers.⁽⁶⁵⁾ He is a non-confrontational person who does not force his opinions on others.⁽⁶⁶⁾ His supervisor has not seen or heard of Applicant getting angry and blowing up at staff.⁽⁶⁷⁾ His work performance is exceptional, and he recommends that Applicant keep his clearance.⁽⁶⁸⁾ Two co-workers praise his honesty and work ethic.⁽⁶⁹⁾ One co-worker states that he loves his family and has strived to keep it together.⁽⁷⁰⁾

Applicant's sister testified on his behalf. She describes him as a hard worker who helps others.⁽⁷¹⁾ She indicates that he and his wife do not always get along.⁽⁷²⁾ Their issues generally relate to their children.⁽⁷³⁾ His wife has an "attitude for no reason", meaning that she is angry for no apparent reason.⁽⁷⁴⁾ She stopped going to her brother's home because his wife made her feel unwelcome.⁽⁷⁵⁾ She describes his children as a little spoiled.⁽⁷⁶⁾ During her visits with him and his family, she never observed any incidents of Applicant hitting his wife or children.⁽⁷⁷⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.⁽⁷⁸⁾

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁷⁹⁾ The government has the burden of proving controverted facts.⁽⁸⁰⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁸¹⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸²⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸³⁾

No one has a right to a security clearance,⁽⁸⁴⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁸⁵⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁸⁶⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽⁸⁷⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline J. Applicant has been arrested twice for domestic assault on a family member. His criminal conduct raises Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally*

charged).

I considered Criminal Conduct Mitigating Conditions (CC MC). Both domestic violence incidents are misdemeanor offenses under state law. The incident with his son occurred over 12 years ago. During an argument, Applicant's son became aggressive towards him by coming at Applicant, then lifting him off the floor, in a demonstration of his son's strength. When his son refused to put him down, Applicant used a wrestling move to gain control over the situation. Instead of calming the situation, his wife called the police. The court directed family counseling, then dismissed the case. The court clearly did not view this situation as out of control or in need of intervention. Before this incident, Applicant had never been involved with the military or local police regarding any criminal conduct.

Despite the ongoing family arguments, particularly those with his wife, Applicant was not involved in any additional domestic violence situations for 11 years, even though his wife often threatened to call the police when she could not get her way. His more recent domestic assault charge did not result from an intentional act, but the accidental striking of his daughter during a fight with his wife. Since his wife has regularly threatened to call the police or 911 during arguments, she called as she believed she had a reason. While his action meets the legal definition of assault, he had no actual intent to harm his daughter. He simply wanted to take the telephone away from his wife.

Based on the advice of the prosecutor who made it very clear that he would go to jail if he did not pled guilty, he did so to his own detriment. He successfully completed the anger management program and has not had any further difficulties with his family. While his plea weighs against him, the fact he made it without the advice of counsel and based on the advice of the prosecutor who would benefit from a guilty plea outweighs the negative impact of his plea.

His domestic violence charges occurred 11 years apart. They are isolated incidences, not a pattern of conduct. He has no other criminal record with the police. His military record lacked any disciplinary actions. His co-workers and supervisor describe him as non-confrontational and calm. He is a reliable and dependable employee who has assumed a certain level of responsibility at work. He supported his family and raised four children, two of whom were not his natural born sons. Rather than work as a team with him in raising their children, his wife regularly worked against the discipline and order he tried to bring to the home. His wife sought a restraining order as a tool to remove Applicant from the house so that their youngest son would move back home. She used the court to get what she wanted. For more than 20 years, he regularly fought with his wife over disciplining their children and teaching them responsibility. Now that they are grown, he has decided to end the arguing and fighting. After living apart from his wife for some time, he has decided to divorce her and move forward in a new direction with his life. Applicant has mitigated the governments concerns under CC MC E2.A10.1.3.1. (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2. (*The crime was an isolated incident*), CC MC E2.A10.1.3.4. (*The . . . factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*). Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a: Withdrawn

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. Applicant Exhibit G is a copy of the court docket sheet related to Applicant's arrest in August 1993.
2. Tr. at 87.
3. *Id.*
4. *Id.*
5. Applicant's Response to SOR, dated October 12, 2005, at 1-2.
6. Government Exhibit 1 (Applicant's security clearance application, dated February 17, 2004) at 1.

7. *Id.*; Tr. at 42.

8. Tr. at 34.

9. *Id.* at 33.

10. *Id.* at 33, 80; Government Exhibit 1, *supra* note 6, at 4.

11. Government Exhibit 1, *supra* note 6, at 1.

12. *Id.* at 2; Tr. at 36.

13. Tr. at 36.

14. *Id.* at 44.

15. *Id.* at 38.

16. *Id.* at 44.

17. *Id.* at 39-40.

18. *Id.* at 45.

19. Applicant Exhibit B (Copy of Police Department involvement record, dated March 27, 2006) at 1; Government Exhibit 3 (Summary of investigator's November 1, 2004 interview with Applicant) at 1.

20. Tr. at 56-57.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 57-59.

28. *Id.*

29. Applicant Exhibit G, *supra* note 1, at 2.

30. *Id.*

31. *Id.* at 1-2.

32. Applicant Exhibit B, *supra* note 19, at 1; Government Exhibit 3, *supra* note 19, at 1.

33. Tr. at 59-63.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; Applicant Exhibit A (Letter and final report to court on anger management course, dated January 12, 2005) at 1-2.

45. Tr. at 70.

46. *Id.*

47. *Id.* at 48-50; Applicant Exhibit D (Son's school record, dated September 25, 2001.) at 1-2.

48. Tr. at 48-52, 69.

49. *Id.*

50. *Id.* at 64-69.

51. *Id.* at 59.

52. *Id.* at 72-73.

53. *Id.* at 73.

54. *Id.* at 74.

55. *Id.*

56. *Id.* at 74-76.

57. *Id.*

58. *Id.*

59. *Id.* at 76-77.

60. *Id.* at 77.

61. *Id.* at 79.

62. *Id.* at 14-20.

63. *Id.* at 16.

64. *Id.* at 17.

65. *Id.* at 18.

66. *Id.*

67. *Id.*

68. *Id.* at 19-20.

69. Applicant Exhibit F (Letter, dated March 2, 2006 and one undated letter) at 1-2.

70. *Id.* at 2.

71. Tr. at 23.

72. *Id.* at 24.

73. *Id.*

74. *Id.* at 25-27.

75. *Id.*

76. *Id.*

77. *Id.* at 29.

78. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.

79. ISCR Case No. 96-0277 (July 11, 1997) at 2.

80. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

81. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

82. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

83. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

84. *Egan*, 484 U.S. at 531.

85. *Id.*

86. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

87. Executive Order No. 10865 § 7.